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No. 91-1157

IN THE
Supreme Court of the United States

October Term, 1991

COUNTY OF LOS ANGELES,
Petitioner,

v.

RICHARD MEILICKE,
aka RICHARD COMPTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 4, 1992

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QUESTION PRESENTED

Whether an unpublished California appellate court decision holding the County of Los Angeles liable for property and related damages caused by its clearly unconstitutional 1977 policy of automatically assisting alleged creditors to seize private property (including federally registered vessels) upon the unilateral assertion by such creditors that there has been a "waiver of due process" -- and of effecting such seizures, over the objection of an alleged debtor, without a judicial or administrative hearing of any kind -- should be reviewed by this Court on the basis of questions:

- neither presented to nor resolved by the trial court, the intermediate appellate court, or the California Supreme Court,

- premised on a characterization of County policy that is at odds with what the courts below found that policy to be as a matter of fact, and

- involving a since-replaced federal statute creating special procedures for judicial arrest of federally registered vessels, which generated the issues identified by the County only five times in 68 years.

RULE 29.1 STATEMENT

Respondent Richard Compton, also known as Richard Meilicke, is an individual.

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STATEMENT OF THE CASE

This case involves nothing beyond an intensely fact-bound application of settled legal rules to a unique situation. The questions raised by petitioner County are defective even apart from their lack of legal merit: the principal issues identified by the County rest on a complete distortion of what the Court of Appeal below actually held; the first two questions offered by the County were not raised in the courts below or passed on by them; and the third question would require this Court to decide unsettled issues of California law regarding security interests in the area of preferred ship mortgages. Furthermore, the case is of no precedential significance: none of the opinions below is published, and thus under California practice none may be cited as precedent. The California Supreme Court denied review of this case. There is no reason for this Court to do otherwise.

The courts below found the County liable for illegally assisting the Nicoletti family to seize respondent's ship, the Magnifico II, by force on November 10, 1977. The Nicolettis obtained the aid of County police officers by showing them a document that purported to be a "preferred ship mortgage" giving the Nicolettis a property interest in respondent's ship and supposedly waiving respondent's right to due process. In fact, as the County conceded below, the entire document was "null and void because it was executed under duress, threats of death and bodily harm and acts of extortion."[1] Nevertheless, County officers were directed by *affirmative County policy* to act on the basis of unilateral assertions (made here by the Nicolettis) that the document was a valid ship mortgage, without resorting to any sort of administrative or judicial process. By the time respondent recovered possession of his ship in 1980, both the ship and the business that had depended on it had been utterly ruined. This case is a textbook illustration of why the Constitution directs the government not to seize property without due process of law.

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[1] Clerk's Transcript ("CT") p. 100 (Complaint). *See also* Supplemental Appendix ("SA"), p. 11, lines 7-16 ("SA-11:7-16") (County's stipulation). The attached Supplemental Appendix identifies and quotes all parts of the trial record that are cited, but not quoted in full, in this opposition, for this Court's convenience in confirming the true state of the record in this case.

To transform it into something quite different, the petition heroically rewrites the record in this case from the ground up. As we show in Part I-B, *infra*, the County's description of its policy in its statement of the case -- supported by no citations to the record -- is entirely fictitious. It contains numerous misrepresentations and is completely at odds with the factual findings and the state-law holdings of the Court of Appeal. In brief, County policy was not simply "to keep the peace and to enforce the criminal law," Pet. 5, or simply to recognize that "parties can waive their right to judicial process prior to repossession, *i.e.*, if the mortgagor has obtained a waiver, a 'self-help' repossession may be permitted." Pet. 6. Rather, the "keep the peace" defense for what the County's officers did was merely a charade to deflect attention from what really occurred. *See* note 4, *infra*.

The policy that was applied, and that caused all of respondent's injuries, was the County's policy to recognize self-help repossession by creditors alleging that debtors had waived due process rights, and indiscriminately and actively to assist those creditors to seize private property without any hearing, without inquiring into the truth, and without any effort to comply with special federal rules applicable to the property at issue -- here, a federally registered vessel subject to the federal Ship Mortgage Act of 1920.[2] The County's creativity in rewriting the record

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[2] Because the Magnifico II was registered with the Coast Guard under federal law, any preferred ship mortgage on it would have been governed by the Ship Mortgage Act of 1920, 46 U.S.C. §§ 951-954 (1982), which established a comprehensive remedial scheme for preferred ship mortgages on federally registered ships (requiring creditors to file a federal *in rem* admiralty action) and specified a federal procedure for creditor repossession (requiring that seizure must be accomplished by a U.S. Marshal serving a federal court order to arrest the ship and place the ship under the jurisdiction of the federal court, *see* Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(3) (Title 28 App.)). The County concedes that the Act's procedure was not followed in this case.

The Ship Mortgage Act, although in effect at all times relevant to this litigation, was repealed and replaced by a new federal statute in 1988. *See* App. 18a n.3; 46 U.S.C.A. § 31321-31330 (West 1990 Pamphlet). *See also* note 16, *infra*.

in this case, and in drafting questions never presented below, are clear indications that no certworthy question could be developed here unless it were manufactured out of thin air. Similarly, the length of this opposition is attributable not to any legal merit in the County's position but rather to its many misstatements of the record and of the decision below.

On October 30, 1978, respondent brought an action in Los Angeles Superior Court pursuant to 42 U.S.C. § 1983, alleging that the County and its officers had "acted without court order, prior notice to plaintiff, or due process hearing in taking possession of [the Magnifico II] and turning said vessel over to [the Nicolettis] thereby depriving plaintiffs of their constitutional right to due process under the California State Constitution and the Constitution of the United States of America." CT 22:3-9. After a trial spanning six weeks and consuming more than 3,000 transcript pages, the Superior Court ruled against the County on the issue of liability, and in a final judgment rendered February 14, 1986, awarded respondent damages for injuries proximately caused by the County's violation of his rights.[3]

On June 28, 1991, the Court of Appeal (Second Appellate District, Division One) unanimously affirmed in all respects.

The County then petitioned for review in the California Supreme Court, attempting to create the appearance of an important legal issue by -- in its own words -- "[s]plicing

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[3] On the issue of liability, the trial court also found against respondent and in favor of the police officer in charge on the scene, Lt. Lee Baca, essentially on the ground that the officer had merely been doing his job as the County had led him to understand it. The Court of Appeal affirmed. App. 35a-38a. Respondent's California Tort Claims Act suit against both the County and Lt. Baca was dismissed on grounds of immunity. The Court of Appeal affirmed on the basis that all actions taken by Lt. Baca leading to respondent's loss of his property were "discretionary" decisions made in pursuit of the County's policy, and therefore entitled to protection under state law. App. 38a-42a. The Court of Appeal's holdings with respect to Lt. Baca reflect and reinforce its definitive factual finding that this case involves the application of County policy, rather than the unauthorized acts of County officials. *See* pp. 7-9, *infra*.

together" enough isolated but supposedly "relevant portions of the Court of Appeal's opinion" to suggest that the lower court's express "unconstitutional policy" factual findings and legal holding were simply legal "legerdemain" because they could not be squared with what was supposedly the "only rational interpretation" of the lower court's opinion taken as a whole. Petition for Review, at 14, 17. Even though the County was joined by a host of other California municipalities who echoed the County's version of what its policy had been and what the Court of Appeal had held, the California Supreme Court, evidently seeing through this strategy, on October 3, 1991, denied the County's petition for review. Treating this case as a purely fact-bound application of settled law with no general significance for the legal world at large, the California Supreme Court also ordered that the Court of Appeal's decision not be published or cited as precedent.

REASONS FOR DENYING THE WRIT

I. THE COUNTY'S FIRST QUESTION IS NOT PROPERLY PRESENTED AND HAS NO MERIT

A. THE COUNTY HAS FAILED TO SHOW THAT THE FIRST QUESTION WAS RAISED BELOW

Pursuant to 28 U.S.C. § 1257(a), this Court will not consider claims that were not raised before or passed on by the state court whose judgment it is asked to review. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988); *id.* at 85 (White, J., concurring); *id.* at 89 (Scalia, J., concurring in part and in the judgment). Implementing this principle, Rule 14.1(h) of this Court requires a petition for certiorari to specify in the statement of the case:

> [T]he stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific

> reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

As to each of the "questions presented," the instant petition plainly fails to comply with this Rule, and for that reason alone should be denied. *See* Rule 14.5.

In fact, the County's first question presented was never argued in the state courts. The County's distinguished appellate counsel, newly added for purposes of this proceeding, have crafted a question of Section 1983 law on which the County was mute below. Indeed, the County's position in this case has always been that its policy was simply one of "keeping the peace," that "a public entity may not be held liable for ordinary negligence in connection with failure to train its employees," and that "the record will not support a finding of deliberate disregard." Opening Brief for Appellant County of Los Angeles in the Court of Appeal, at 21, 25 (quoting argument headings). The County acknowledged that "[l]iability may be imposed . . . where the government entity causes a constitutional violation through the execution of a governmental policy or custom," *id.* at 20, and indeed contended that "[t]he *only* way the County could be liable for Baca's actions was if Baca had inflicted a constitutional injury while executing County policy." *Id.* at 23 (emphasis in original). The County denied that Baca had done so; the Court of Appeal disagreed. None of the County's arguments below implicated (nor has any court in this case passed on) the question the County now presents, namely: "Whether a local government may be liable under 42 U.S.C. § 1983 for a policy that is lawful in the ordinary course simply because the policy causes a violation of a federal statute in an exceptional circumstance not foreseen when the policy was adopted or enforced."

B. THE FIRST QUESTION RESTS ON A MISCHARACTERIZATION OF WHAT THE COURT BELOW ACTUALLY HELD

The County attempts to manufacture a question that it hopes is certworthy by maintaining that the decision of the California Court of Appeal is in tension with *City of Canton v. Harris*, 489 U.S. 378 (1989), and "imposes strict liability" based on a supposed "failure to train police officers on myriad technical and shifting points of law." Pet. 9. The County's argument and question presented are premised on a complete distortion of what the Court of Appeal actually held. The Court of Appeal clearly understood the import of *City of Canton*, as evidenced by its accurate exegesis of that decision. *See* App. 15a-16a. But *City of Canton* is not dispositive here. This is not a failure-to-train case, but rather one involving a municipal policy that was itself illegal under federal law. Looking beyond the County's verbal smokescreen, if there are any disputed issues in this case, they are: "As an historical matter, what was the relevant policy toward self-help repossession of the County of Los Angeles in 1977?," and "Did this particular respondent prevail below on an 'unlawful policy' theory, or on a 'failure-to-train' theory?" It is difficult to imagine more fact-intensive and less certworthy questions than these.

1. This Is Not a "Failure-to-Train" Case

The Court of Appeal rejected the County's assertions -- now recycled in its petition for certiorari -- that the relevant policy applied at the time of the events in question was simply to "keep the peace," Pet. 11, and to permit a "party [to] waive his or her right to judicial process prior to repossession." *Id.* at 12. Instead, the Court of Appeal stressed that "this case cannot be treated simply as a failure to train case but must be viewed as a case involving an *unlawful policy*." App. 25a (emphasis added). The County's policy, according to the court below, "went beyond mere peacekeeping." App. 23a. There was ample evidence in the record that no threat of violence ever existed and therefore that the County's "keep the peace" defense was a charade based

on perjury by County officers.[4] As the Court of Appeal found, the County's policy was to side with, and to facilitate repossession by, any purported creditor who alleged that a debtor had waived "due process," without affording judicial or administrative process to test such allegations, and without making any effort to comply with special federal rules applicable to the property at issue. The Court of Appeal explained that:

> The policy included assisting in self-help repossessions where it was determined one party to the mortgage had waived 'due process' and the right to object to the repossession. . . . [H]ere the waiver was given effect and [the County's] employees assisted in the self-help repossession by forcing plaintiff to

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[4] For example, Deputy Cowen, who was on the scene when the danger of violence supposedly commenced, indicated that although there was a civil dispute over the ownership of the Magnifico II, no one was near the ship threatening Compton, there was no immediate danger of confrontation, and at the time Cowen turned over control to Baca *all* concerns about violence had passed. SA-1:34 to SA-2:16. Evidence from Lt. Baca indicates that no threat of violence arose thereafter. In a sworn affidavit made shortly after the events in question, and filed on behalf of Nicolino Nicoletti against respondent's state-court action for emergency relief, Baca stated that "Compton agreed to leave the vessel peaceably and orderly" and that "[w]hile in my presence I observed no breach of the peace *and no threats of violence by either party involved.*" SA-2:24-29 (emphasis added) (quoting Exhibit 18).

To be sure, some officers claimed that a serious threat of deadly violence did exist, but this testimony was contradicted by other witnesses and depended entirely on the officers' credibility. In fact, the trial judge expressly stated that he simply did not believe such claims. In his decision from the bench concerning liability, the trial judge explained: "There are a lot of things that I think I want to say, and yet, I am not sure I ought to say" concerning the fact that "a lot of [witnesses] have taken a lot of liberties with the truth in this case. I think I will comment on only one." SA-1:7-10. The trial judge then condemned one officer as an "outright liar" for his testimony that in the midst of a supposed "near-riot going on, [with] people threatening to kill each other," the officer saw "one of the participants in that melee pass a gun to another" -- but that the officer never said "anything about it to anybody" until seven years later at trial, and "never [did] anything about it at all." The trial judge declared: "I simply do not believe that ever happened," and he concluded: "Now, that may give you some indication of the way the court received most of the defendants' case." SA-1:11-31.

> bring the Magnifico back to the dock, by forcing him and his security guard off the boat, and by allowing the Nicolettis to place their guard on the boat and refusing to allow plaintiff or his wife to return to the boat. Since [the County's] policy and actions went beyond mere peacekeeping, it cannot escape liability.

App. 23a.[5]

Indeed, the County itself argued in the trial court that its deputies had done precisely what the County's policies in November 1977 dictated. In an exchange with the trial judge, County counsel specifically stated that no amount of training could have avoided the violations of federal rights at issue here, because County officers had acted exactly as required under County policy. **SA-5**:1-31. This was of course the ground on which Lt. Baca was granted immunity for his actions. *See* note 3, *supra*. The County insisted, and the record revealed, that under County policy, its officers would be expected to side with and assist creditors in effectuating self-help repossession whenever those creditors recited "the magic words," **SA-3**:39, accusing their debtors of trespass and invoking citizen's arrest authority. *See* **SA-3** to **SA-4**; *see also* **SA-6** to **SA-10** (excerpting detailed testimony on this policy and on how it was applied in this case).

Faced with this damning record, the trial court concluded that the seizure of respondent's property represented not a deviation from the County's 1977 policy but, "semantic[s]" aside, instead a "deprivation of constitutional rights . . . *bound to happen*" under that policy. **SA-5**:35-38 (emphasis added). In fact, the County's initial brief below maintained that "it would [not] have

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[5] Tellingly, the County's petition for certiorari fails to quote any relevant portion of the Court of Appeal's opinion. Instead, the County simply asserts that the trial court held, as a basis for liability, that "the Sheriff's Department had failed to train its officers or to adopt a policy with respect to enforcement of preferred ship mortgages." Pet. 7. But what is sought in this case is review of the Court of Appeal's judgment, not that of the trial court. And the County's description of the trial court's decision is extremely misleading; as the Court of Appeal explained, the trial court did *not* in fact rest its decision on a failure-to-train theory. App. 24a.

made any difference if Los Angeles had trained its deputies concerning preferred ship's mortgages" because under County policy its officers "still would have been required" to commit the acts that the Court of Appeal found were the basis of the County's liability. Opening Brief of Appellant County of Los Angeles in the Court of Appeal, at 29. For the County now to insist that the cause of respondent's injury in this case was "the *absence* of policy or training," Pet. 13 (emphasis in original) is directly contrary not only to the intensely factual holding of the Court of Appeal but also to the County's own arguments in both the trial court and the Court of Appeal.

2. The Decision Below Is Not Based on a "Nonfeasance" Theory

The County was not held liable for "nonfeasance" -- i.e., "for failing to adopt a policy on foreclosure of preferred ship mortgages," Pet. 14 -- but rather on the basis of the County's *affirmative policy* of aiding all self-help repossessions. The Court of Appeal did not find that the County had drafted an otherwise lawful policy that simply was silent on the subject of the repossession of property with special designations and protections under federal law. On the contrary, the Court of Appeal specifically *rejected* the County's claim that it was guilty of merely "a failure to adopt a policy concerning preferred ship mortgages." App. 16a-17a. Instead, the court explained that the County's policy was to assist self-help repossessions "regardless of the type of property in dispute," App. 28a, and thus to draw no distinctions based on the nature of the property seized in the repossession:

> It is admitted the Sheriff's Department had no specific policy regarding repossessions under preferred ship mortgages. *Its policy was to treat all civil repossessions alike*: The Sheriff's Department was to function in an impartial manner, not taking sides or determining who was right and wrong, but merely ensuring no breach of the peace took place. Generally, repossessions could not be effected if the owner was in personal possession of the property and objected to repossession. However, Lieutenant Baca testified, policy allowed that if the parties agreed to *waive* their due process rights, reposses-

sion could be effected *even over the owner's objection.*

App. 18a (emphasis added).

It was clear to the Court of Appeal that the County "did have a policy to permit self-help in civil repossessions if the parties waived due process rights and that policy was applied here," and that Lt. Baca had acted on the basis that "plaintiff had waived his due process rights and Nicolino Nicoletti therefore was entitled to immediate possession of the Magnifico, even over plaintiff's objection." The Court of Appeal concluded: "There being a policy, the question is whether there is substantial evidence to support the conclusion this policy violated plaintiff's federal statutory rights." App. 18a; *see also* App. 23a, 25a.

In sum, the Court of Appeal did not hold the County liable for failing to adopt a special policy to implement the Ship Mortgage Act (or, indeed, any other federal law). Rather, the court held the County liable for a straightforward application of its deliberate policy of applying a uniform approach that refused to draw distinctions based on the kind of property being repossessed. The court simply held that, if a California city or county (a) *chooses* to adopt an affirmative policy of aiding self-help repossession efforts by official means, and (b) *chooses* to apply that policy indiscriminately to all types of property, without regard to distinctions drawn by federal law, and (c) *chooses* to have its officers act on the basis of untested representations by one of the parties that the other has waived her right to due process, and (d) *chooses* to bypass any sort of judicial or administrative procedure, then the city or county will be liable for the adjudicated violations of federal law that executing this policy causes.

C. IN ANY EVENT, THE COUNTY'S FIRST QUESTION DOES NOT WARRANT REVIEW

Even if the County's first "question presented" had been preserved, and had a basis in the decision below, the question would present no issue worthy of this Court's review.

1. The County Simply Ignores the Fact That Its 1977 Policy Violated Due Process

The County's focus on the Ship Mortgage Act and its insistence that its policy is "generally correct and lawful" in the "ordinary course," Pet. i, 13, betray a fundamental misconception about this case. The critical defect in the County's 1977 policy was that it violated due process, not some sort of minor technicality triggered by a since-repealed federal statute. Thus, although the Ship Mortgage Act did play an important supplementary role in this case -- by prescribing the specific procedures by which a party must use a federal instrument to seize a federally registered ship[6] -- the Act was not the sole or even the primary reason that the County's policy was illegal. The Act simply regularized and gave specific content to the "process due" in this particular area of the law.

The County can make its claim that its policy was "generally" valid only by ignoring what the courts below determined its policy to be in 1977, *see* p. 6-10, *supra*, and euphemistically referring to its policy as one of "recognizing waivers" to judicial process. Pet. 13. But County policy did much more than that: it required County officers forcibly to assist a self-help repossessor to gain the private property of another person -- without resort to *any* judicial or administrative procedures -- solely on the basis of the repossessor's unilateral assertion that he or she was entitled to the property, above the property holder's vehement objections, *see* note 10, *infra*.[7] The core constitutional flaw in

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[6] *See, e.g.*, App. 23a (County "policy included assisting in self-help repossession where it was determined one party to the mortgage had waived 'due process' and the right to object to the repossession. In the case of a preferred ship mortgage, such a waiver is not valid and there is no right to self-help repossession.").

[7] The County makes much of the fact that the mortgage presented by the Nicolettis to the police purported to authorize self-help repossession, and to waive respondent's right to judicial and administrative procedures. *See* Pet. 4. But the County stipulated long ago that the entire mortgage, together with the purported waiver, was completely invalid because it was extracted from respondent and his family at gunpoint. *See* p. 1 & n.1,

the County's policy has nothing to do with federally registered ships. Indeed, the County's policy would obviously violate due process as applied to any vessel, vehicle, or other item of real or personal property.

The County's policy flies in the face of such elementary due process cases as *Fuentes v. Shevin*, 407 U.S. 67 (1972), where this Court found violative of due process state replevin provisions that permitted vendors to seize goods by making an *ex parte* application to a court clerk, unilaterally pointing to a written purchase agreement containing a purported waiver of due process, and posting a bond. Indeed, the County's policy was more clearly and flagrantly unconstitutional than this, and exceeds anything contemplated by even the dissent in *Fuentes*. *See* 407 U.S. at 99-102 (White, J., dissenting). The County's policy demanded no bond or detailed affidavit, afforded no opportunity for a prompt post-deprivation hearing,[8] and required

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supra. The County's position that it may give effect to any waiver whose invalidity is not apparent on the document's face, Pet. 4, proves respondent's point. The invalidity of forged, extorted, or similar waivers will almost never be apparent from the face of the document alone, and the County's blanket policy of giving effect to all such waivers guarantees a significant number of due process violations. Thus, in *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972), this Court found a due process violation despite the existence of a written document, valid on its face, that purported to authorize self-help repossession.

[8] In this case, respondent unsuccessfully sought a preliminary injunction in state court against the Nicolettis to reclaim his vessel. But this was not an adequate post-deprivation remedy, because under California law such relief is available only in extraordinary circumstances. Furthermore, the preliminary injunction proceeding did not adjudicate the legality of the ship *seizure* under federal law, because, after the County deputies had helped the Nicoletti family gain possession of respondent's ship, Nicolino Nicoletti executed a private sham sale transferring legal title in the vessel to himself. It was the legitimacy of that transaction, and specifically the enforceability of a security agreement that purported to authorize the sale and transfer of ownership, that was at issue in the preliminary injunction proceeding. *See generally* Clerk's Transcript, pp. 1-14.

Hence, petitioner's claim that the County was not the "moving force" behind respondent's loss of his yacht because the state court "deni[ed] his

application not to a neutral magistrate or court clerk but simply to a police officer.[9] The petition's citation of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), Pet. 14, proves respondent's point. There this Court warned that even "in the civil area, '[w]e do not presume acquiescence in the loss of fundamental rights,'" *id.* at 186 (citation omitted), and found that a party had waived its right to pre-deprivation judicial process only because the waiver had been "voluntarily, intelligently, and knowingly made." *Id.* at 187; *see also Fuentes*, 407 U.S. at 94-95. In this case, the waiver was the product of extortion, and the very design of the County's policy meant that the underlying extortion would not be examined, and that the resulting involuntary "waiver" would be enforced.[10] The County's policy

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motions for a preliminary injunction," Pet. 12 n.12, is entirely without basis. The state trial court in that separate action against the Nicolettis did not reach the question of the legality of the seizure. In addition, as the Court of Appeal noted, "the exercise of the court's independent judgment in the Nicoletti action did not cause plaintiff's injury but merely failed to prevent exacerbation of an injury which already had occurred." App. 26a.

Finally, petitioner speculates that even if County policy had been lawful, respondent nonetheless might have lost his vessel. Pet. 12 n.12. The Court of Appeal carefully analyzed this claim and properly rejected it. App. 25a.

[9] *See also Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (striking down a Wisconsin statute that permitted a creditor to effect prejudgment garnishment of wages without notice and prior hearing); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (invalidating an ex parte garnishment statute that not only failed to provide for notice and prior hearing but also failed to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt post-deprivation hearing).

[10] *See* page 1 & n.1, *supra*. Indeed, in this case respondent promptly and vocally objected to repossession and explained that the preferred ship mortgage was obtained through extortion -- both to Lt. Baca individually, *see* **SA-14**:11 to **SA-16**:16; **SA-18**:19-33, and to County officers generally. *See* **SA-11**:19 to **SA-14**:9; **SA-17**:26 to **SA-18**:15. Respondent's wife also strongly objected to repossession on the same grounds, but was dragged from the ship by County officers. *See* **SA-16**:19 to **SA-17**:23. County policy simply did not assign any significance to these objections, and they were accordingly ignored. County officers were commanded by County policy forcibly to assist the Nicolettis' efforts at self-help repossession.

plainly "presents too great a risk of erroneous deprivation" to withstand due process scrutiny. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2114 (1991); *cf. Zinermon v. Burch*, 110 S. Ct. 975, 986-90 (1990).

To be sure, the Court of Appeal did not go so far as to hold explicitly that the County's policy of indiscriminately assisting creditors with self-help repossession violated due process even as applied to property *other* than a federally registered ship, although it is hard to avoid the conclusion that it would have. In a model of judicial restraint, the court below evidently preferred to rely on a narrow statutory ground made available by the special facts of the case before it rather than reaching for a broader constitutional ground that would have swept in a wide range of factual settings:

> Plaintiff had the federal statutory right not to have the boat taken from him unless the procedures set forth in the Ship Mortgage Act were complied with, which did not occur. Therefore, defendant's policy, which enabled Nicoletti to obtain immediate possession of the Magnifico over plaintiff's objection without having him go through "due process," violated plaintiff's federal statutory rights. This being the case, defendant may be held liable for the violation under section 1983.

App. 28a. But the court left no doubt about the underlying nature of the dispute and noted on at least seven occasions in its opinion that the crux of respondent's complaint has always been that he suffered "deprivation of his property *without due process of law*." App. 11a (emphasis added). *See also id.* at 10a-11a (referring to "due process"); *id.* at 13a (noting County's claim that it "did not violate plaintiff's constitutional rights"); *id.* at 15a (discussing liability for violation of "federal constitutional rights"); *id.* at 18a (referring to "due process rights"); *id.* at 23a (twice referring to "due process"). Respondent, who consistently raised the due process argument in the proceedings below, is of course free to defend the Court of Appeal's judgment on that basis in this Court.

The County's first question presented is thus fatally flawed

because it ignores the unconstitutionality of the County's policy under the Due Process Clause of the Fourteenth Amendment. This precludes any conceivable suggestion that County policy is somehow "lawful in the ordinary course."

2. The First Question is Foreclosed by Precedent

The County maintains that, because its policy was "generally correct and lawful," Pet. 13, it should be held liable only if it was "deliberately indifferent" to the need for an "exception" to cope with the "extraordinary" and arcane requirements of the Ship Mortgage Act. Pet. 14, 16. The County's position is deeply flawed.

First, the salient norm here is due process, not the Ship Mortgage Act, and even under the County's proposed approach it can hardly be said that due process is a "technical, counter-intuitive exceptio[n]," Pet. 15, regarding which the County is entitled to plead ignorance.

Second, the County's contention is foreclosed by *Owen v. City of Independence*, 445 U.S. 622 (1980), which expressly held that municipalities enjoy no good-faith immunity whatsoever under Section 1983 and thus cannot defend against Section 1983 liability for damages caused by policies that violate federal law by proving that they did not deliberately intend to transgress federal requirements. It is no defense to say that the Ship Mortgage Act is arcane or that the County could not reasonably have been expected to know of it. "[W]hen a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision . . . . Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Owen*, 445 U.S. at 649. The *Owen* rule has been repeatedly and recently reaffirmed, *see, e.g.*, *Howlett v. Rose*, 110 S. Ct. 2430, 2443 (1990); *Will v. Michigan Department of State Police*, 491 U.S. 58, 67 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 12 n.3 (1989); *Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *Brandon v. Holt*, 469 U.S. 464, 472-473 (1985), and the County, which barely mentions *Owen* in its

petition, Pet. 14, does not ask that it be re-examined. Nor does this case -- with its record of an egregiously unlawful policy in violation of due process, of the Ship Mortgage Act, *see* note 11 and pp. 22, 25-29, *infra*, and perhaps also of state law, *see* pp. 24-25, *infra* -- present an apt opportunity to reconsider *Owen*.

The County complains that a municipality cannot be expected "to anticipate" legal requirements for its policy "that have not even been established at the time the policy is made." Pet. 16. Of course, the requirements of both the Due Process Clause of the Fourteenth Amendment and the Ship Mortgage Act of 1920 were well known at the time the County promulgated and executed its policy.[11] But, at any rate, the County's legal position was rejected by this Court in *Owen* itself (*see* 445 U.S. at 658 (Powell, J., dissenting)), and in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *See* 475 U.S. at 485 (White, J., concurring); *id.* at 491 (O'Connor, J., concurring in part and in the judgment).

Third, the County's attempt to engraft the "deliberate indifference" standard of *failure-to-train* law onto a case involving an *unlawful policy* is wholly unwarranted and confuses apples and

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[11] Even in 1977, one could hardly have avoided recognizing the conflict between the County's policy and the Ship Mortgage Act of 1920 -- as revealed by the testimony at trial of respondent's admiralty attorney, who quickly reached that conclusion on the day of the events in question. As the Court of Appeal noted, "Attorney Russell told [respondent that] federal law protected the boat from seizure under a preferred ship mortgage except by a federal marshal acting under court process, such as an arrest warrant, and he advised plaintiff to take the boat out to sea to avoid any attempted repossession." App. 5a. To Russell, in 1977, it was obvious what federal law required, and he explained it quickly to respondent. *See* **SA-19** to **SA-20**. Further, Russell then briefed Lt. Baca, the County official in charge, on the procedure, as Baca admitted. *See* **SA-21**. Russell's advice was well grounded in then-existing precedent. *See* pp. 26-27 & n.22, *infra*. The case on which the County relies (Pet. 13-14), *Challenger, Inc. v. Durno*, 227 F.2d 918 (5th Cir. 1956), is distinguishable for the reasons noted by the Court of Appeal below: it did not "discuss or analyze the question whether the Ship Mortgage Act allowed state-law self-help procedures to repossess a vessel subject to a preferred ship mortgage." App. 20a.

oranges.[12] Respondent's identification of official County policy -- which by definition the County adopted consciously rather than accidentally or negligently -- is sufficient to demonstrate a deliberate act undertaken by the County. There is no danger here, as there is in the failure-to-train area, of disguised *respondeat superior* liability, nor is there the possible linguistic difficulty posed by "the submission that someone pursues a 'policy' of 'inadequate training.'" *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion).

Where an unlawful municipal policy is shown, there is no need for an additional showing, before liability is imposed, that the policy is "generally" invalid or that the municipality was "deliberately indifferent" to a possible "extraordinary application" of that policy. Pet. 16. Rather, "once a municipal policy is established, 'it requires only one application . . . to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.'" *Pembaur v. Cincinnati*, 475 U.S. 469, 478 n.6 (1986) (quoting *Tuttle*, 471 U.S. at 822 (plurality opinion)). Respondent showed, and the Court of Appeal found, "an affirmative link between the [unlawful] policy and the particular constitutional violation alleged." *Tuttle*, 471 U.S. at 823 (plurality opinion); *see, e.g.*, App. 23a, 25a.[13]

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[12] In this regard, the County's citation of a series of lower court cases decided and argued exclusively on failure-to-train theories is irrelevant. *See Buffington v. Baltimore County*, 913 F.2d 113, 123 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991); *Santiago v. Fenton*, 891 F.2d 373, 381 (1st Cir. 1989); *Dorman v. District of Columbia*, 888 F.2d 159, 163 (D.C. Cir. 1989). The County's description of *Merritt v. County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989), is particularly misleading. *Merritt* was pleaded, argued, and decided as a straightforward failure-to-train case; the court did not decide that "the County's general policy was lawful" or that the need for an "unusual exception" should be judged according to a deliberate indifference test. Pet. 15. Rather, the court simply noted that there was not sufficient evidence that any deficiency in the police officers' training was the product of deliberate indifference.

[13] The County errs when it asserts that this is a case where some sort of broad, general policy like "maintaining a police force," Pet. 13 n.13, has

Fourth, the County's suggestion that it may not be sued for adopting a "generally" valid policy has no application here. It is disingenuous to characterize as valid "in the ordinary case" an *affirmative* municipal *policy* of indiscriminately assisting self-help repossession whenever a creditor claims that a debtor has waived "due process," whether or not the property involved possesses a special status under federal law. As a practical matter, the County's policy may well be challenged in court only when the creditor's claim *is* fraudulent and only when the seized property *does* have a special status under federal law. But that does not mean that the policy is "generally" valid, and the County's insistence otherwise amounts to an assertion that a tree falling in the forest makes no noise if there is no one nearby to hear it. The County's policy contains critical defects that, while perhaps not triggered by the factual circumstances of every case, unavoidably cause it to violate federal constitutional and statutory rights in those instances where they come into play.[14]

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been cited in an attempt to infer that every detail of the police force's conduct (such as the use of deadly force, as in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)) can be traced to official municipal policy. In this case, there was a factual finding by the Court of Appeal that the County of Los Angeles had specifically instructed its officials to assist self-help repossession efforts by creditors who asserted that debtors had waived due process rights, without any resort to judicial or administrative process, over the objection of the alleged debtor, and regardless of the status of the property at issue under federal law. The *Tuttle* Court distinguished precisely this kind of case. *See* 471 U.S. at 820.

The County did not preserve below, and does not advance here, any claim that the trial evidence was factually insufficient to support the Court of Appeal's findings as to what the County's policy was. There is, of course, no rule that only a formally memorialized paper trail, or other "smoking gun" evidence of deliberations from on high, can suffice to establish an illegal municipal policy. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-481 (1986); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970).

[14] The County's policy here is in this respect comparable to New York City's policy in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 661 n.2 (1978), of placing pregnant employees on maternity leave

Fifth, the County's proposal would plunge both municipalities and the federal courts into a sea of confusion by making municipal liability turn on subjective and unprincipled judicial "eyeballing." The County offers no test for determining when a policy is "generally" lawful and when it is not; what kinds of "excep-

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after their fifth month except where continued work was permitted by a physician and the head of the employee's agency. That policy was not "generally valid," as the County itself admits, Pet. 14, even though it did not give rise to damage actions for backpay in cases where, for example, the woman did obtain the requisite permission to continue working, or was forced for health reasons to take leave anyway after the fifth month. Similarly, the municipal policy in *Owen* of terminating at-will employees without a hearing did not "necessarily entail[] a violation of federal rights in every situation in which it applied." Pet. 14. Rather, the policy was unlawful because it denied a hearing even when "an allegedly false statement impugning [the employee's] honesty and integrity" had been released. *Owen*, 445 U.S. at 633-634 n.13.

In the County's parlance, the City of Independence had merely "fail[ed] to carve out an 'exception' to [its] policy," Pet. 14, of not providing hearings to address the "extraordinary application" of that policy, Pet. 16, in circumstances where allegedly defamatory statements were released about the employee. Nevertheless, this Court did not find the City immune from liability. In the same vein, this Court did not ask whether the policy at issue in *Pembaur* -- warrantless forcible entry under certain situations -- was "generally" invalid or whether the possibility of exigent circumstances (such as hot pursuit) or consent made such a generalization impossible.

In cases such as *Monell* and *Owen* involving unlawful municipal policies, this Court has never bothered to inquire where the policy at issue was valid "generally" or in the "ordinary course," or even whether there were situations in which the policy could lawfully be applied. Such an approach, if ever appropriate, would be limited to failure-to-train cases, where the gravamen of the claim is that "a *concededly valid* policy [has been] unconstitutionally applied by a municipal employee." *City of Canton*, 489 U.S. at 387 (emphasis added). Even in the failure-to-train context, this Court has already rejected the proposed rule -- proffered with great skill by the same esteemed counsel who now represent the County in this case -- that only policies unconstitutional in all their applications may give rise to Section 1983 liability. *See City of Canton v. Harris*, 489 U.S. 378, 386-387 (1989); *id.* at 396 (O'Connor, J., concurring in part and dissenting in part). Where a municipality has officially adopted a policy that is invalid -- either facially or in terms of particular applications of the policy -- the County's proposed approach is irrelevant.

tions" are "major one[s]," Pet. 15, that a municipality apparently may be required to address; and how frequently municipal agents must encounter a problem before a municipality may be expected to adopt a policy exception to deal with it. Pet. 16. The contrary approach of both this Court and of the California Court of Appeal -- that a municipality may be held liable for violations of federal rights caused by its official policies -- is much more principled, and is settled law.[15]

II. THE COUNTY'S SECOND QUESTION LIKEWISE IS NOT PROPERLY PRESENTED AND HAS NO MERIT

The County did not raise at trial, on appeal, or before the California Supreme Court the second question, regarding the rights of mortgagors under the Ship Mortgage Act of 1920, that it now presents in its petition for certiorari. Not surprisingly, the County also fails to comply with Rule 14.1(h) with respect to this

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[15] Finally, even if the County's question had been properly raised below, even if it were not foreclosed by the Court of Appeal's decision regarding the nature of the County's policy, and even if it presented an important legal question, review would still be inappropriate in this case because the Court of Appeal, in the course of rejecting a different legal argument raised by the County, noted in the alternative that the "deliberate indifference" standard was met here. The court explained that the County's "lack of policy . . . may 'amount[] to deliberate indifference to the rights of persons with whom the [sheriff's deputies] come into contact.'" App. 17a-18a (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

The County complains that there was not "sufficient evidence to support a finding of deliberate indifference." Pet. 13. But, whatever the merits of that purely fact-bound argument, the County has procedurally defaulted on it by failing to request a statement of decision in timely fashion from the trial court. The Court of Appeal explained that, under long-settled California law, "[w]here there is no statement of decision, the appellate court must assume the trial court found every fact necessary to support the judgment." App. 15a. Thus, even if this Court were inclined to review the factual record for itself to determine the sufficiency of the evidence regarding deliberate indifference, the County's procedural default would preclude such review, for it means that the Court of Appeal's judgment rests on an adequate and independent state-law ground. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

question, making it proper to decline review under Rule 14.5. Review here would be entirely inappropriate, and there is no reason to hold the petition pending the decision in *Suter v. Artist M.*, No. 90-1488, which will, at any rate, involve a very different statutory scheme with little relevance to this case.

Review is also unjustified because the County policy plainly violated respondent's rights under the Due Process Clause of the Fourteenth Amendment, and there is thus no need to decide *any* question regarding the availability of self-help measures under the Ship Mortgage Act -- a topic which, according to the County, arose precisely *five* times (besides this case) in the 68 years between the Act's passage in 1920 and its repeal in 1988. Pet. 20 & n.18. After repeal, the Act was replaced with a quite different statute; a decision by this Court concerning the old Act would therefore have no binding future effect. *See* note 2, *supra*, and note 16, *infra*. Moreover, no court (state or federal) has ever considered the second question presented by the County: whether the Ship Mortgage Act of 1920 conferred on mortgagors a right enforceable under § 1983. This Court would have to examine the matter without any guidance from any other tribunal.

Even if this Court wanted to decide whether the Ship Mortgage Act of 1920 or its replacement conferred enforceable rights on mortgagors, this case would be a poor vehicle indeed for accomplishing that end. Although the Nicolettis showed the County's officers a document *purporting* to be a "preferred ship mortgage," it was not really such a mortgage at all (as the County concedes, *see* p. 1 & n.1, *supra*), but rather an extorted document which the Nicoletti family had obtained at gunpoint. It would be little short of fantastic to "decide" the rights of mortgagors under a since-repealed statute in a case in which there is no true mortgagor. A phantom voyage in so leaky a boat would reach no destination worthy of this Court's concern.

But even if the very oddity of the proposed trip were to hold some special charm, this Court could hardly accept the County's invitation, for the County offers no persuasive argument on the merits of its question presented. At a general level, the Ship Mortgage Act was intended to benefit both mortgagors and

mortgagees by regularizing the creation and foreclosure of preferred ship mortgages. To be sure, Congress "hope[d] that the financial investors, or the banking interests of the country, will be willing to invest their money more freely in ship securities." *Recording of Mortgages on Vessels and Subordinating Maritime Liens Upon Vessels for Necessaries to the Liens of Mortgages: Hearing on H.R. 8422 Before the House Comm. on the Merchant Marine and Fisheries*, Pt. 1, 66th Cong., 1st Sess. 4 (1919). But the Act was not an effort to protect investors; it was primarily a move to benefit mortgagors, to stimulate the expansion of the U.S. merchant marine fleet after World War I.

At a specific level, both the text and structure of the Act indicate that mortgagors were its intended beneficiaries. The Act specifically referred to mortgagors. 46 U.S.C. §§ 922(c)(1), 951 (1982 ed.). *See Wilder v. Virginia Hospital Assn.*, 110 S. Ct. 2510, 2517-18 (1990). And, like the NLRA provision at issue in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989), the rights of mortgagors were apparent in the "structure" of the Act. The Ship Mortgage Act functioned in a manner akin to the Bankruptcy Act: it required that a creditor seeking to foreclose a preferred ship's mortgage do so in an *in rem* suit in admiralty, over which federal district courts were given exclusive jurisdiction. 46 U.S.C. § 951. The creditor bringing suit was required to give notice to "the master of the vessel" and "any person who has recorded a notice of claim of an undischarged lien upon the vessel," § 951, in order to avoid a destructive race among creditors that would create a "collective action" problem and make all worse off. *Cf.* T. Jackson, *The Logic and Limits of Bankruptcy Law* 11-19 (1986). The Act prohibited creditors from acting "to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel." § 922(a)(3). This structure evidenced a congressional intent to create an enforceable right in mortgagors -- for, by asserting a violation of the Act's ban on self-help remedies, a mortgagor prevented a creditor from circumventing the claims of other holders of preferred ship mortgages.

III. THE COUNTY'S THIRD QUESTION SIMILARLY IS NOT PROPERLY PRESENTED AND HAS NO MERIT

The County's third question, relating to the preemptive effect of the Ship Mortgage Act of 1920, is also completely inappropriate for review for reasons already discussed: (1) the County's policy is inconsistent with due process, and so its conflict with the Ship Mortgage Act is unnecessary to the judgment below; (2) the Ship Mortgage Act has been repealed and replaced with a new and different law;[16] (3) the preemption of self-help reme-

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[16] *See* note 2, *supra*. The County takes a bird's eye view of the two statutes and announces from this perspective -- with no supporting analysis -- that the relevant provision "remains substantially unchanged." Pet. 22 n.20. This assertion is wholly unwarranted. Even a cursory glance reveals that the 1988 replacement statute, which appears at 46 U.S.C.A. § 31321-31330 (West 1990 Pamphlet), was intended, in the words of one of its Senate sponsors, to "revolutionize our vessel financing system." 134 Cong. Rec. S17080 (Oct. 20, 1988) (statement of Sen. Breaux). The new law makes substantial revisions in the definition of preferred mortgages, 46 U.S.C.A. § 31322, and in filing and recording requirements and discharge conditions, § 31321, and it adds civil and criminal penalties for noncompliance. § 31330. None of these features of current law could be examined if the County's petition were granted, and their relevance for preemption analysis would remain unexplored. A decision by this Court in this case would therefore control no future case, and the County cites no case currently pending that involves an application of the old law. In particular, there are at least three aspects of the 1988 law that directly implicate the preemption question:

(1) Unlike the old Act's foreclosure provision (46 U.S.C. § 451), the corresponding section in the new law (46 U.S.C.A. § 31325(b)) lists three ways in which, "[o]n default of any term of the preferred mortgage, the mortgagee may enforce the preferred mortgage lien." Self-help repossession is not one of the specified methods of enforcement. The omission of self-help repossession might be taken to imply that it is not an available option. *See, e.g.*, *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988).

(2) The 1988 statute added a new means of enforcing a mortgage: a non-admiralty civil action against the mortgagor. 46 U.S.C.A. § 31325-(b)(3). Prior to 1988, the mortgage could be enforced only if the vessel were in U.S. waters; the new provision makes it easier to enforce the mortgage if the vessel is overseas. *See* H.R. Rep. No. 918, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News

dies is a matter that arose only a handful of times during the Act's 68-year history, *see* p. 21, *supra*; and (4) this case does not involve an actual preferred ship mortgage, *see* p. 21, *supra*.

The third question is defective -- even apart from its merits -- for yet another reason: even if "the Ship Mortgage Act does not preempt *state* enforcement of contractual provisions for nonjudicial foreclosure" (quoting the question presented; emphasis added), the County's policy would nonetheless be preempted because it appears to go beyond what state law authorizes. There is significant doubt regarding whether California law allows the self-help seizure of a federally registered ship,[17] or whether it

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6114. The Washington Supreme Court inferred from this change "that the committee intended for a mortgagee to proceed under the Act even when the vessel was beyond the court's jurisdiction and not to have state law applied by default." *Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 95 (Wash. 1990). The change effectively seals state law out of a potential gap in the old Act's coverage, preserving the uniformity of federal law on preferred ship mortgages.

(3) The 1988 law strengthened notice requirements, § 31325(d); as Congress explained its concern: "[I]t is possible for a vessel to be sold without the holder of the preferred mortgage even knowing that the vessel was sold. The Committee believes that this defeats the purpose of preferred mortgages." H.R. Rep. No. 918, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 6114. In the same way, self-help repossession results in a change of ownership (and often a change of location and use of the vessel) without notice to holders of preferred mortgages. It is inconceivable that Congress meant to permit unilateral resort to un-noticed self help -- a practice that would defeat the central aim of the legislation.

[17] California Commercial Code § 9104(a) provides that the State's self-help repossession provisions do not extend to "a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties and third parties affected by transactions in particular types of property." Comment 2 to this provision incorporates the Uniform Commercial Code note to the U.C.C.'s parallel provision, explaining that "[t]he Ship Mortgage Act of 1920 is an example of such a federal act." Thus, the California Commercial Code exempts from its self-help authorization provision mortgages that fall within the scope of the Ship Mortgage Act. Security agreements in California are enforceable *only* to the extent that they are authorized under the Code; common-law theories are expressly nullified. Commercial Code §§ 9501(1), 9501(3), 9201.

authorizes self-help repossession of *any* property where the possessor objects to seizure.[18] There are thus strong reasons to believe that this case does not even *involve* the question presented by the County. In addition, assessing the County's contention that its policy is consistent with state law recognizing "contractual provisions for self-help foreclosure," Pet. 19, and is therefore not preempted by the Ship Mortgage Act, would plunge this Court into the depths of the California Commercial Code. The state-law questions were not passed on by the Court of Appeal -- which held that the County's policy was preempted regardless of its status under state law -- but they would inevitably confront this Court if it were to consider the County's question presented.[19] The prospect of such state-law review by this Court, of course, raises grave questions under *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874), and the County's petition should be denied for that reason alone.

In any event, the County's policy in 1977 *was* preempted by the Ship Mortgage Act for two related reasons: (1) "it regulate[d] conduct in a field" -- foreclosure of preferred ship mortgages -- "that Congress intended the Federal Government to occupy exclusively," *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990), and (2) it stood "as an obstacle to the

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[18] *See* note 10, *supra*. California Commercial Code § 9503 authorizes self-help repossession only if it can be accomplished "without breach of the peace." Repossession over the debtor's protest or his request to leave the premises constitutes breach of the peace. *See, e.g., Hartford Financial Corp. v. Burns*, 158 Cal. Rptr. 169, 173 (Cal.App. 1979). Interpreting a statutory provision identical to California's, an Arizona appellate court, in a case involving a creditor who had merely secured the *presence* of a sheriff to prevent anticipated violence -- without any active role by the sheriff, and despite the possessor's failure to tell the sheriff that he objected to repossession -- held that the creditor had thereby breached the peace. *Walker v. Walthall*, 588 P.2d 863, 864-65 (Ariz.App. 1978).

[19] In addition, if the County's policy were found unlawful under state as well as federal law (an argument that respondent preserved below), then the fact that respondent was deprived of his property (the Magnifico II) without due process would be even plainer. *See, e.g., Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876).

accomplishment and execution of the full purposes and objectives by Congress." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (internal quotations omitted).[20]

We have already noted the function of the Ship Mortgage Act in preventing a destructive race among creditors. *See* p. 22, *supra*. It is obvious that permitting a mortgagee to enforce self-help remedies would severely prejudice the interests of other possible mortgagees and creditors, who, without the elaborate notice provisions of the Ship Mortgage Act, might not discover that the vessel had been seized and sailed away by its new "owners" until it was too late.[21] Under the County's view, mortgagees could contract for (or even fraudulently procure, as in this case) an infinite variety of self-help remedies, thus placing the interests of other mortgagees at risk and discouraging the investment in shipping that Congress sought to promote. At the very least, a patchwork of self-help remedies that varied from state to state would utterly eviscerate the federal aim of a

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[20] County policy was also *expressly* preempted because the Act provided that a preferred mortgage "may be enforced by the mortgagee by suit in rem in admiralty" and further that "[o]riginal jurisdiction of all such suits is granted to the district courts of the United States *exclusively*." 46 U.S.C. § 951 (1982 ed.) (emphasis added). The presence of the word "may" indicates not that the mortgagee is free to disregard the foreclosure procedures prescribed by the Act, but only that the mortgagee is free to refrain from *any* foreclosure at all. *See Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 94 n.2 (Wash. 1990). If Congress had used the word "must," for example, then it would have implied that mortgagees were *required* to initiate foreclosure procedures, even if they did not desire to do so. Congress did not use the word "may" to eliminate the Act's preemptive effect, and in fact added the term "exclusively" in the next sentence of § 951 specifically to counter such an interpretation. *See Recording of Mortgages on Vessels and Subordinating Maritime Liens Upon Vessels for Necessaries to the Liens of Mortgages: Hearings on H.R. 8873 before the House Comm. on the Merchant Marine and Fisheries*, Pt. II, 66th Cong., 1st Sess. 93-95 (1919).

[21] Congress's decision to grant state courts concurrent jurisdiction over *in personam*, but not *in rem*, actions, Pet. 21 n.19, proves our point: *in personam* actions typically raise no "collective action" problem (and, to the extent they do, traditional bankruptcy protections are available).

"simple, clear, and definite" *uniform* procedure for the foreclosure of preferred mortgages in federally registered vessels. *Detroit Trust Co. v. Barlum*, 293 U.S. 21, 40 (1934).[22]

Not surprisingly, two recent courts (in addition to the California state courts) have squarely rejected the County's position. The Supreme Court of Washington, in a carefully reasoned, thoughtful and unanimous decision, held "that the Ship Mortgage Act provides the exclusive remedy for foreclosure of a preferred ship mortgage," and that private self-help repossessions are forbidden. *Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 95 (Wash. 1990). The Northern District of California similarly concluded that there is "'simply no room for the operation of state law' on the issue of whether extrajudicial private sales are permissible." *Bank of America National Trust & Savings Association v. Fogle*, 637 F. Supp. 305, 307 (N.D. Cal. 1985) (quoting *Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504, 506 (5th Cir. 1973)). The *Fogle* court

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[22] *See also Fourchon v. Louisiana National Leasing Corp.*, 723 F.2d 376, 383, 384 (5th Cir. 1984) (warning that the "application of state law to preferred ship mortgages [would] ten[d] 'to introduce an undesirable lack of uniformity'" and discerning "no relevant gaps in the federal scheme") (citation omitted); *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1347 (5th Cir. 1981) ("the [Ship Mortgage] Act applies exclusively and overrides state procedures, practices, and consequences"), *cert. dismissed*, 456 U.S. 966 (1982); *Bollinger & Boyd Barge Service, Inc. v. The Motor Vessel Captain Claude Bass*, 576 F.2d 595, 597 (5th Cir. 1978) ("even though state law may occasionally be used to fill gaps in federal maritime law, there were no such gaps in the Ship Mortgage Act"); *Nat Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504, 506 (5th Cir. 1973) ("the Ship Mortgage Act provides a comprehensive scheme for the foreclosure of preferred ship's mortgages and any remaining deficiency judgments against the debtor personally; there is no room for the operation of state law"); *J. Ray McDermott & Co. v. M/V Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972) (*en banc*) ("Congress intended that . . . the Act wholly and completely supersede state law and practice in every respect. . . . '[T]o engraft the various nuances of state law . . . would introduce an undesirable lack of uniformity' . . . . The Ship Mortgage Act . . . forms a comprehensive procedure for the foreclosure of a preferred ship's mortgage.") (citation omitted), *cert. denied*, 409 U.S. 948 (1972).

commented that "[i]t is more than a little disingenuous to say that when a statute specifically authorizes a specific, detailed procedure for something, that statute is deemed to be 'silent' on the question of whether *some entirely different procedure* can be substituted for it." 637 F. Supp. at 307 (emphasis added). *Nate Leasing* and *Fogle* are compelled by the long and steady line of precedent stressing the comprehensiveness of the Ship Mortgage Act and its creation of the exclusive remedy provided by a uniform federal foreclosure procedure.

Against this weight of authority the County advances one aberrant decision: *Brown v. Baker*, 688 P.2d 943 (Alaska 1984). *Brown* does not demonstrate the existence of conflict or confusion in the lower courts; to the contrary, *Brown* itself is the outlier, and the Court of Appeal in the instant case followed the clear (and settled) majority rule in concluding that County policy violated the Ship Mortgage Act. There is no reason to review *this* case in order to reverse the obvious mistake made in *Brown*, where the Alaska Supreme Court cited none of the key precedents concerning the Ship Mortgage Act, and *not one* of this Court's preemption decisions. *See* 688 P.2d at 949. *Brown*'s fallacy is highlighted by the Alaska court's acknowledgement that the Ship Mortgage Act preempted state *judicial* foreclosure proceedings with respect to federally registered ships, regardless of any attempt by the parties to provide for state foreclosure by contract. *See* 688 P.2d at 949. The County in this case made the same concession before the Court of Appeal. *See* Appellant's Reply Brief before the Court of Appeal, at 8. Yet the Alaska court nonetheless maintained that the Act did not preempt *private*, self-help remedies. This overlooks the glaring fact that, having deemed state courts too non-uniform and irregular to enforce preferred ship mortgages, Congress could hardly have found adequate the even less regular process of individual self-help with no judicial supervision. If, as the County has taken great pains to insist, the Ship Mortgage Act is a relatively obscure law, then there is no basis for assuming that Congress meant to entrust repossessions to the local cop on the beat, rather than (as the Ship Mortgage Act provides) to United States Marshals and federal district courts. Thus, in *Nate Leasing*, the

Washington Supreme Court specifically addressed *Brown* and unanimously found its reasoning unpersuasive. *See* 789 P.2d at 93. There is no need for this Court's review.

CONCLUSION

At bottom, the County's petition for certiorari rests on a poorly camouflaged plea that this Court protect it from the fiscal consequences of a supposedly "extraordinary damages award[]," Pet. 9, despite the Court of Appeal's careful examination of the damages issues raised below by the County (which it has abandoned here), and its unanimous affirmance of the award in full. App. 27a-33a. The Supreme Court of California rejected a similar plea by the County in declining to review its petition; there is no reason for this Court to show the County greater solicitude. In truth, the size of the judgment is largely a function of mounting interest (at a statutory 10 percent rate) and of continuing lost profits (at a daily rate of $901.36) whose accumulation is attributable to the County's *own* delay in paying a judgment entered against it in 1986. It is in the interest of the County's own taxpayers, if not in the interest of its officials who might prefer to delay indefinitely the day when they will be held accountable by those taxpayers, that this case finally end.[23]

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[23] This petition is not the County's only attempt to postpone the day of reckoning when its taxpayers will see the final bill for the County's unlawful policy. Although the judgment in this case became final for purposes of California law after the California Supreme Court denied review on October 3, 1991, the County subsequently commenced a collateral attack on the interest rate in the Superior Court's 1986 final judgment, specified at 10 percent, arguing that state law permitted only an interest rate of 7 percent. *See* Pet. 8-9 n.11. The County omits to mention that on December 30, 1991, the Superior Court denied the County's motion, noting that the County had "had myriad opportunities to raise the interest rate issue in the six years since the judgment was entered" and that it could not be excused for its failure to object to the 10 percent rate at trial, on appeal, or in the California Supreme Court. The Superior Court observed that "[n]othing precluded an earlier and more appropriate attack" and added that the County had "fail[ed] to present any 'exceptional circumstances' to explain its failure to raise this [interest rate] issue earlier during the appeal process." *Meilicke v. County of Los Angeles*, WEC 056172 (Super. Ct., Dec. 30, 1991). On January 16, 1992, the County filed a notice of appeal from the Superior Court's ruling.

The petition for certiorari should be denied.

Respectfully submitted,

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February 4, 1992

SUPPLEMENTAL APPENDIX

Excerpts from trial transcript
(Reporter's Transcript ("RT"))
in *Meilicke v. County of Los Angeles*,
No. WEC 56172 (Cal. Super. Ct. 1984).

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I. EVIDENCE AND COURT FINDINGS CONCERNING LIES BY COUNTY OFFICERS ABOUT THE ALLEGED THREAT OF VIOLENCE

Statement of Trial Judge on Plaintiff's Motion for Directed Verdict (RT 1881-82):

THE COURT: There are a lot of things that I think I want to say, and yet, I am not sure I ought to say. There have been many witnesses in this case and a lot of people have taken liberties with the truth in this case. I think I will comment on only one.

When Mr. Sherrill testifies, in the face of the picture that all of the defendants' witnesses are painting this near-riot going on, people threatening to kill each other, and he testifies that he sees one of the participants in that melee pass a gun to another and never says anything about it to anybody, never does anything about it at all, he is either an outright liar or the biggest fool I have ever seen in my life.

What kind of law enforcement is that? Guns in the middle of a melee where people are threatening to kill each other and he does nothing about it.

Now, the answer to that is I simply do not believe that ever happened. I believe Mrs. Compton and Mr. Compton when they say there was no gun, because otherwise, I have to believe that we have hired a hopeless incompetent as a protector of the peace. There just is -- if a law enforcement officer -- no, I don't want you to say anything more -- sees such a thing and does nothing about it, the term dereliction of duty does not even begin to cover such a situation.

Now, that may give you some indication of the way the court has received most of the defendants' case. I am getting down to a disposition of it.

Direct by Plaintiff's Counsel to Deputy Cowen (RT 261-62):

Q: Was there anybody on the boat with Mr. Compton that was threatening him?

A: Not that I remember.

Q: The people who were -- anybody at the dock was about 75 or 80 feet away, right, at the gate?

A: Yes.

Q: The gate is a pretty long distance away; is that right?
A: Yes.
Q: There was no immediate danger that they were going to come down and engage in fisticuffs with Mr. Compton, was there?
A: I didn't know of that.

(RT 280-81):
Q: At the time you left the scene Lieutenant Baca was there?
A: Yes.

* * *

Q: So things had quieted down, so you didn't think there was any more danger of violence?
A: Well, I wouldn't have left if I thought there was.
Q: All right. And you left, turning over the handle to Lieutenant Baca?
A: Yes.

Direct by Plaintiff's Counsel to Lt. Baca (RT 1031-33):
Q: [Y]ou gave [this] declaration in the capacity of being a lieutenant in the Los Angeles County Sheriff's Department?
A: Yes

* * *

A: [Reading from Exhibit 18, the declaration signed by Baca] "Compton agreed to leave the vessel peaceably and orderly and no arrest was made."
Q: Read the next paragraph, please.
A: "While in my presence I observed no breach of the peace and no threats of violence by either party involved."
Q: [R]ead the last paragraph, please.
A: "I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge and understanding and that this declaration was executed in Los Angeles, California on December 22, 1977."

II. EVIDENCE AND ADMISSIONS CONCERNING THE COUNTY POLICY THAT WAS APPLIED

Closing Statement of Defense Counsel (RT 1738-42):

Let's assume that -- we know for a fact at some point in time Mr. Davis and Mr. Nicoletti decided that they were going to repossess this boat. Let's assume that they are sitting around and they say to themselves, "God, it is a great day. It is November 10th, 1977. What are we going to do today? Well, why don't we go and repossess a boat. Now that's a great idea." So they get in their cars and they drive down to the marina, but they have one major problem. There is a guard on board the boat that they want to repossess and this guard has orders not to allow anyone on board.

So they probably say to themselves, "Well, if we try to take possession of this boat we might get hurt. So how are we going to prevent that particular event from occurring?"

So Mr. Davis has a devious mind, after all he is a lawyer and he comes up with a plan -- (Laughter)

He comes up with a plan and he says, "Well, that's no problem. Let's get the sheriff to do it for us." And he explains his plan. "God, that's a great idea. Do you think it works? Trust me," says Mr. Davis. "It will work." So they then proceed to the sheriff's station and that's where our story begins and that's where we know the facts start.

Mr. Davis, Mr. Nicoletti walk into the sheriff's station and they ask to speak to the individual in charge. We know that that person was Mr. Baca and Mr. Davis says, "Well, we want to repossess a boat today." Captain Baca knows what the policy of the County of Los Angeles is and he says to Mr. Davis and Mr. Nicoletti, "Look, the Sheriff's Department cannot, does not and will not become involved in a civil repossession."

Now, at this point Mr. Davis begins to put his plan into operation. He tells Captain Baca, "Captain Baca, You don't understand, the boat we want to repossess has a guard on it and that guard has orders not to allow anyone on board," and he explains that there is bad blood between his client and the people who own the boat and he takes it one step further. He says, "We want to make a citizen's arrest of that guard for trespassing."

Well, bingo. He has said the magic words. He has immediately placed Captain Baca in a double dilemma.

* * *

Captain Baca also knows that any citizen can make a citizen's arrest of any other citizen for whatever reason he wants, right or wrong, and he also knows that if a citizen chooses to make a citizen's arrest of another person, rightly or wrongly, the sheriff or any peace officer is required to take that person who has been arrested into custody, and knows that if the sheriff does not take that person into custody pursuant to that citizen's arrest, then the sheriff commits another crime.

* * *

Captain Baca knows that he can't tell Mr. Davis or Mr. Nicoletti not to go down to the boat, because, after all, they have a constitutional right to go anywhere they want to go and he can't tell them that they are not allowed to exercise the right of citizen's arrest, a right which the law gives them. Davis and Nicoletti produced a document called a preferred ship mortgage and they say, "It is on the strength of this document that we are going to do what we want to do."

It does not make any difference whether the document is, in effect, valid or invalid, whether or not it gives them any rights to do anything so long as Mr. Davis and so long as Mr. Nicoletti believe they could do what they wanted to do; right or wrong, they could do it and there is nothing the sheriff could do, but Lieutenant Baca did have an alternative. He could try to talk them out of doing what they were wanting to do.

(RT 1750):

So what did they do? Mr. Davis executed his plan he decided on earlier and that was he would make a citizen's arrest of Mr. Compton for trespassing and he wanted to make a citizen's arrest of Mr. Compton for grand theft boat or trespassing and again, right or wrong, he can do it, and, right or wrong, once he does that, once he attempts to do that, the officers have to remain, the officers have to take the person into custody.

If the officers don't they have committed a crime and again Mr. Davis, Mr. Nicoletti placed the Sheriff's department in that dilemma.

(RT 1755):

So, my whole point, ladies and gentlemen, is that Mr. Compton was not allowed to leave that boat, to leave that area, because the sheriff had no choice. The sheriff had to do what Mr. Davis and Mr. Nicoletti were insisting upon.

Questioning by Trial Judge of Defense Counsel On the County's Motion for Directed Verdict *(RT 1872-75)*:

THE COURT: Let me ask you this question. In view of the testimony of all of the people who were asked on the subject that they never received any specific training with respect to preferred ship mortgages, and in view of the law that before there can be a repossession under preferred ship mortgages there must be a filing in the federal court and U.S. Marshal's activities and all of that, what would your answer be to this question:

If there had been such training and Captain Baca knew about that, would what happened have happened because he would have known there has been no federal action filed, this is not the United States Marshall bringing me this stuff. Nobody has said to the master, "We have filed against the ship." How do you respond to that?

* * *

MR. GALLAGHER: Let's assume that Captain Baca were trained specifically and knew --

THE COURT: And he knew that under the preferred ship mortgage there had to be all of this federal work done --

MR. GALLAGHER: Correct.

THE COURT: -- would what happened have happened?

MR. GALLAGHER: If Nicoletti says, "I want that boat and I am going to exercise my rights to take that boat," Captain Baca does not have the right even if he is trained in preferred ship mortgages to say to Nicoletti or Davis, "No, you can't do that." He's got no right to intercede. They can do whatever they want to do. They may commit a crime. They may commit a tort. But after they commit the act, then the officer can make an arrest or do whatever. But he can't prevent them from doing what they want to do.

Oral Findings of the Trial Judge *(RT 1884)*:

THE COURT: [A]lthough that in itself is not an official policy, that is a semantic way of expressing it, and I think [this was a] situation where deprivation of constitutional rights, and there is no question that there was deprivation of constitutional rights on November the 10th, 1977, was bound to happen and is bound to happen again, and for that reason I find for the plaintiffs and against the County of Los Angeles.

Direct by Plaintiff's Counsel to Deputy Smith (RT 398-400):

Q: What option were you explaining to [Compton]? What could he do to avoid arrest?

A: That in California --

Q: What could he do to avoid arrest? What option was it that he could do to avoid arrest, sir?

A: He could not place himself in a position of trespassing so that he could get arrested for a misdemeanor by another private citizen.

Q: Well, what would he do to not place himself in a position of trespassing?

* * *

A: He could take himself out of the environment that was perceived to be trespassing by whoever arrested him, whoever could arrest him.

Q: Is that a fancy way of saying "get off the boat"?

A: Not to me it is not.

Q: Do you mean get off the boat, he could get off the boat so he wouldn't be on the boat and be subject to arrest for trespass?

A: I wanted him to be clear of his option to get off the boat and to sidestep getting arrested.

* * *

Q: [D]o you mean by that that he wouldn't be subject to arrest if he vacated the vessel?

A: That's correct.

Q: Thank you. Although there is another option that was available, isn't that correct?

A: I don't know.

* * *

Q: Did you have in mind to be advising the occupant of the boat that to place himself -- to take himself out of the environment by removing the vessel, did you have that in mind?

A: That's not an alternative, in my perception. By him removing the boat he is not taking him out of the area where he is vulnerable to arrest. He is still on the boat. He is still trespassing, whether he is outside of the breakwater or in the slip.

Q: That means, in order for your interpretation of that to be true, then, sir, you believed the boat was Mr. Nicoletti's; is that correct?

A: No, that's not true.

* * *

Q: That was not your understanding?

A: I had determined that Mr. Nicoletti had felt that he was [the owner]. Therefore he was capable of placing the security guard under private person's arrest.

(RT 458-59):

Q: [W]hat was said between you and Lieutenant Baca concerning the reading of [the preferred ship mortgage to Sandy Sanderson, Mr. Compton's guard on the ship on the day in question]?

A: I can remember two items that Lieutenant Baca told me. The necessity to read him items on the document and a reminder that our posture is that of -- we just want to be nice to this guy . . . . I wanted him to be clear that the Sheriff's Department does not want to impose upon Sanderson's right as a citizen. We just want him to be clear about a private person's arrest and his vulnerability that anyone can arrest anyone else whether or not a crime has been committed.

(RT 529-30):

Q: Do you understand that with respect to this preferred ship mortgage that Mr. Compton was entitled to, if he objected to turning over the ship to Mr. Nicoletti, did you understand that he was entitled to a court hearing?

A: No.

Q: Did you understand that he was entitled to due process before the ship could be taken away from him?

A: No, not really.

Direct by Plaintiff's Counsel to Lt. Baca (RT 914):

Q: [I]t is your understanding on November 10, 1977 that your understanding was that parties could contractually waive the right to due process. That's what you said your understanding was; right?

A: Absolutely.

Q: . . . [A]nd in conjunction with the incident at hand, that you were provided with documents that indicated to you that Mr. Nicoletti could obtain a court order if he wanted to?

A: No, no.

Q: Isn't that correct?

A: No, that doesn't say that in the document.

Q: No, that was your understanding of due process relative to those documents that Mr. Nicoletti could obtain a court order to enforce his rights; didn't you just finish saying that, sir?

A: Certainly that's an option he has.

Q: But he did not have to obtain a court order to enforce those rights?

A: According to the preferred ship mortgage, that's correct.

Q: And your understanding of due process was that Mr. -- then isn't it true that Mr. Compton or the Rexroats, the other parties, had waived their right to due process? The other parties had waived their right to due process?

A: Yes, you are correct.

(RT 917):

Q: Did you understand at any time that Mr. Compton objected to the repossession of the vessel? Any time that day, November 10th?

A: Mr. Compton at the boat objected to the repossession.

Q: And at that point, then, under your idea of due process, didn't you understand that Mr. Nicoletti was required under the law to obtain a court order in order to repossess it?

A: Mr. Nicoletti, as I have testified earlier, was not and is not required to acquire a court order.

(RT 945-46):

Q: Well, let's say, for example, that I came up to you and I had a document that gave me an interest in Mr. Gallagher's car, and Owen Gallagher [defense counsel] was in the car and I came up to you and I said, "Look, arrest that man. I am making a citizen's arrest to put him into custody."

Would you understand that based on my representations that you would be obligated to do so?

A: I would be obligated to do so by law, not necessarily because your representations are correct, but the law requires me to do that, whether they are correct or not.

(RT 947-48):

Q: [W]asn't it just as ridiculous for you to send down a

deputy sheriff to tell Mr. Sanderson that he was going to be arrested unless he got off the boat?

A: We didn't do that. The purpose of sending Deputy Smith to the guard was to inform the guard, just as Deputy Smith stated in the tape, that this is what the basis behind the citizen's arrest would be. That it is not a Sheriff's Department decision, it is not a Sheriff's Department authority that's compelling this arrest; Mr. Davis or Mr. Nicoletti, either one, that intended to do this.

If in the repossession of the ship the guard stands in the way.

(RT 986):

Q: Now, assuming that that preferred ship mortgage was valid on November 10, 1977, and assuming that Mr. Nicoletti went to repossess the boat and Mr. Compton objected, what were Mr. Nicoletti's rights as you understood them on that day?

A: To repossess his boat.

Q: Over and above Mr. Compton's objection?

A: Yes.

(RT 1001):

Q: Now, let's say hypothetically that Mr. Compton had objected to the repossession by Mr. Nicoletti. What was your understanding of what Mr. Nicoletti's rights to repossess the boat were at that point?

A: That he had the right to do it.

Q: And could he board the boat while Mr. Compton was on it?

A: Absolutely.

(RT 1004-06):

Q: [Quoting from Exhibit 17, Field Training Guide used at Sheriff's Academy]: I would like to read [the] next section under "Buyer's Rights." Quote:

"The buyer has a right to object to the repossessor's taking of the property. This objection may be oral or by conduct . . . . '[I]f the buyer is in personal possession of the [property] and protests against such repossession and attempts to obstruct the seller in doing so, it becomes the duty of the seller to proceed no further . . . and to resort to legal process.'" [Citation omitted].

* * *

Q: Now, where were you trained as a Los Angeles Sheriff?
A: At the Sheriff's Academy.

* * *

Q: Now, was there any -- did you have any doubt that Mr. Compton, either verbally or by his conduct, was objecting on November 10, 1977 to Mr. Nicoletti's repossession?
A: He was definitely objecting. There is no doubt about that.

* * *

Q: Wasn't it your understanding that once on November 10th, that once Mr. Compton objected to Mr. Nicoletti taking his vessel, that your duty was to advise Mr. Nicoletti to go to court and get a court order?
A: No, the law regarding the matter is the department's policy, not this training bulletin. This is a guide to provide deputies information that gives them the ability to make situational decisions based on circumstances at hand, and if you read further into the document you will find that kind of commentary made.

Direct by Defense Counsel to Lt. Baca (RT 1636-38):
Q: Did you believe in good faith, Captain Baca, at the time that you took these actions, that your acts were in accordance with your official duties as an officer for the Los Angeles County Sheriff's Department?
A: Yes.
Q: Do you still believe that?
A: Yes.
Q: And if you had to do it over again would you have done it any differently than you did?
A: No. No, I don't think so.

III. EVIDENCE SHOWING THAT RESPONDENT OBJECTED TO THE REPOSSESSION, AND INFORMED COUNTY OFFICERS OF THE UNDERLYING EXTORTION

Trial Judge's Comments During Pretrial Proceedings (RT 53):

THE COURT: Let's try to put the stipulation on the record at this time. It is my understanding that it is stipulated by and between counsel at this time, said stipulation later to be read to the jury at whatever time we deem it appropriate, that the preferred ship's mortgage, which was exhibited to the defendants on the day of the incident in question, has since been judicially determined to be invalid as having been obtained through coercion, the facts of which invalidity were not apparent on the face of the document at the date, time and place in question.

Direct by Plaintiff's Counsel to Richard Compton (RT 1191):

Q: What connection did you come to know Mr. Sanderson in?

A: I hired Sandy Sanderson as a guard to stay aboard my boat and protect my boat from Franco Nicoletti and these gangster associates of his.

Q: Had Mr. Nicoletti tried to take possession of the boat prior to that time?

A: Twice.

(RT 1211):

Q: Now, going back to November 10, 1977, what was your first contact with any problem concerning the Magnifico?

A: On November 10th.

Q: Yes.

A: I was at my apartment with my wife and I got a call from Sandy Sanderson, my guard aboard the Magnifico II.

* * *

Q: What did Mr. Sanderson say?

A: Mr. Sanderson told me that Franco Nicoletti and his attorney and his brothers were down at the boat and they were trying to take possession of the boat, and I told him to pull the gangway up and I would be right down.

(RT 1215):

Q: What did you do when you went into the [ship], if anything?

A: Sandy gave me these documents, the preferred ship mortgage. As soon as I saw it I knew what they were.

(RT 1218):

Q: Now, when you saw and recognized the documents when Sandy gave them to you --

A: Oh, absolutely.

Q: Had you signed those documents?

A: Well, yes, I had signed those documents, yes.

Q: Are these the documents upon which the judgment that we have a stipulation with respect to the judgment refers to that were obtained by extortion?

* * *

A: Yes.

(RT 1219):

Q: Okay. Now, Sanderson handed you the documents, you recognized the documents and what happens next?

A: Well, Sanderson was telling me that the sheriffs were threatening to arrest him and if he didn't give up the boat, didn't get off the boat.

* * *

I said, "Sandy, stay here. Leave the gangway up. I have got to call my attorney, Carlton Russell, right away." He is an admiralty attorney.

(RT 1222-23):

Q: After you had the conversation with [Russell], what did you do?

A: [B]ased upon what I was told to do, I told Sandy to go down, start the engines of the vessel, and to prepare it to take it out of the slip.

(RT 1237):

Q: And did you then have a conversation with [the owner of the neighboring ship,] Mr. McMillan?

A: Yes, I told Pat what was occurring. I said, "These people obtained this document by putting a gun to my head and threatening the lives of my mother-in-law, myself, and my wife and the Sheriff's Department is down there demanding that I give the boat up," and I talked to my attorney and my attorney had recommended that I take the boat out.

I was really confused. I said, "What should I really do?" I got police officers on the dock with guns and making all of the threats that they are going to arrest you and Pat says, he said, "Well, you got a federally-documented vessel. Take the boat out. Once you are away from the dock what are you going to do? You can argue about it later on."

(RT 1240):

Q: Now, when did you, if at all, begin to speak over your P.A. system?

A: I didn't start speaking over my P.A. system until I had actually backed the vessel out of the slip and pivoted the boat to head it toward . . . the main channel.

At that time, as soon as the boat was directed toward the main channel, then I was free to use the microphone and start speaking to the Sheriff's Department who were on the dock and were up on the street level.

(RT 1243-44):

Q: On the P.A. system, what did you say?

* * *

A: I told [the Sheriff's Department] they were making a big mistake. I told them the documents that they were trying to enforce, the preferred ship mortgage, had been obtained as a result of threats of death upon the lives of my wife and my family and that I had filed a criminal complaint with the Lennox County Sheriff's Department and I told them to ask [Deputy] Cowen, because he knew about these fraudulent, these forged [Department of Motor Vehicles] documents that they had.

And I told them Nicoletti was a crook and that he was involved with organized crime, that they had no right to do what they were doing and they were making a big mistake and that I was not going to give up possession of my boat.

I said a lot of other things.

(RT 1248):

Q: What took place [in the main channel]?

* * *

A: I walked over to the side and I said [to the sheriff's deputies], "these guys are trying to take my boat away from me [with] documents that they obtained by threatening my family's life."

I said, "You guys are making a big mistake." I mean, check with Lennox. Check with the Harbor Patrol."

(RT 1261-62):

Q: What did you do [after you returned the ship to the slip]?

A: I called Lieutenant Baca directly."

* * *

Q: And what was said between you two?

A: told Mr. Baca that, "Mr. Baca," I said, "these deputies are making a big mistake. I own this boat and I have got documentation to prove it. This document has been extorted."

He said, "Look, I don't know anything about that. The boat belongs to Nicoletti. Those documents say he has a right to possess it. If you don't leave the boat you are going to be arrested.

That's just exactly what Mr. Baca said.

(RT 1307-12)

Q: Tell us what was said [between you and Baca at the sheriff's station]?

A: I asked him why he had taken me off my home, off my property, and why he had turned it over to Nicoletti when I was the owner of the boat. What was he doing with this preferred ship mortgage? I said, why didn't he arrest Nicoletti. He is the crook. I said, Why don't you check out all of the things I have been telling you? Check out the grand theft complaint that's on file over there. Why don't you ask Deputy Cowen? Why don't you ask Deputy Smith? Why don't you at least allow my wife to go home to get the documents showing my ownership of this boat?

* * *

Q: What did Lieutenant Baca say, to your recollection, while you were at the sheriff's station?

A: I reiterated to -- well, I was telling Baca the story of all of the previous attempts by Nicoletti and all of the threats on our lives

and how they obtained this mortgage by extortion, how they threatened our lives, threatened to kill us the two prior attempts and the report that I put on there. . . . Baca didn't want to hear it. He says, "The documents says the boat belonged to Nicoletti," didn't want to hear it at all. He said, "Talk to somebody else. You contact your attorney about that. The document says that Nicoletti owns the boat."

I tried to argue with the man, but it is pretty hard to argue with a badge of authority once they make up their mind.

* * *

Q: Did you tell Lieutenant Baca about what the Magnifico was?

A: I expressed to Mr. Baca how much equipment -- I had over half a million -- I had almost three-quarters of a million dollars worth of personal belongings on this boat, recording equipment and cameras and developing -- things I had collected all of my life. Worked all of my life to acquire. Almost 40 years. Every dime I had. Every day I was spending with that boat. That boat was my life.

* * *

A: . . . I told him Nicoletti had no court order. They had no right to do this. They had no right to take me out of my home, kick me off of my property, take my home away from me, and my business away from me.

Q: What did Lieutenant Baca say, how did Lieutenant Baca respond to that, if he did at all?

A: Mr. Baca ignored me in a very nice way and just asserted, he said, "Mr. Compton, you are going to have to take this matter up with your attorney and the documents say that the boat belonged to Mr. Nicoletti and Mr. Nicoletti is full within his rights to take possession of the boat," and he said, "We are not going to detain you at this time." He said, "We are going to let you go, but if you go back to the boat, I am going to see that you are arrested and you are going to go to jail."

That's exactly what the man said.

I asked Mr. Baca if he would impound the boat, put a guard on it, my own guard, put another guard on it or one of the sheriff's guards or a marshal or something, on the boat to protect my property.

He said, "We are not in that business. We don't do those

things." They had no place to take and put the boat. I asked him to leave it in the slip right where it is but don't put a crook's guard on the boat. Don't let Nicoletti have my boat. But that's what they did.

* * *

Q: When you had possession of the boat and you were taking it out, what was your understanding of your rights to maintain your possessions?

A: Just like any other piece of property. I was in possession of the property and I believe that as any citizen does, that he has a right to contest any adversary position that's brought against him and I believe that he is entitled to a hearing.

Q: Did you intend to voluntarily relinquish any right that you had to maintain possession of the Magnifico at any time on November 10th?

A: Absolutely not, no, I did not. I was forced off that boat.

Direct by Plaintiff's Counsel to Dawn Roddenberry Compton (respondent's wife) (RT 1466-68):

Q: Okay. Then what took place?

A: Rick took me into the main salon -- called the living room -- and he explained to me that he had just brought the boat back and that the sheriff's department was trying to give possession of the boat to Nicoletti.

* * *

Q: Did he give you any instructions as to whether or not to let the boarding ladder down no matter what the sheriff said.

* * *

Q: What's the next thing that you remember?

A: Next thing I remember there were two deputies behind me chasing me around the boat.

Q: Now, was there any communication between you and the deputies?

A: Yes.

Q: What was said?

A: They told me that I would have to either get off or be arrested.

Q: What did you say?

A: I said, "I am not leaving my boat. This is my home. I am

not leaving."

Q: What did they say, if anything?

A: They say, "You either leave or we are going to arrest you."

Q: Just tell us what took place.

A: They chased me around till I got to the boarding ladder, one got in front and one got in back and they took me off the boat.

(RT 1470):

Q: Well, did they touch you or did they just invite you off at that point?

A: No. They touched me and they took me off. They grabbed me by the wrist and led me down the gangplank and then when I got down to -- on the dock they both took me by both wrists and held me really hard. I didn't start walking because I wanted Rick to know they were taking me. I started yelling, "Help, help, Rick, Rick." They started walking and they started dragging me along.

(RT 1475):

Q: When you left, where were the Nicoletti party?

A: They were on board the boat by then.

Q: They were on board the boat?

A: Yeah.

Q: You saw them board the boat?

A: I saw them board the boat with deputies.

Direct by Plaintiff's Counsel to Dennis Fields (RT 696):

Q: And was Mr. Compton broadcasting on his P.A. system the entire time while the Magnifico was underway?

A: Yes, he was.

Q: Okay. Now, what was he saying if you recall?

A: He was making statements that he had reported that the Magnifico had been trying to be taken by Franco Nicoletti in the past. He had reported that to the sheriff's department and the Harbor Patrol, I believe, and that he was not bringing the Magnifico back, and at the same time the Harbor Patrol boat saying, "You bring the boat back, turn it around or we are going to board you and place you under arrest."

(RT 707-08):

Q: What was he saying?

A: He stated that the only reason he is going to stop and turn the boat around is under threat of duress and arrest.

Q: And he had been broadcasting all along this way down the channel; is that right?

A: Yes, all the way down, yes, sir.

Q: Was he saying -- what was he saying all the way down the channel, if you remember, if he was saying anything that you remember?

A: I don't recall everything exactly, but the gist is that he had filed a report that the boat had been taken from him before and he wasn't going to let it happen again and that he had been threatened at gunpoint and had the [boat] taken away from him, and he was not going to let the Mafia and the racketeers take the boat away from him again. It was his.

Direct by Plaintiff's Counsel to Lt. Baca *(RT 917)*:

Q: Did you understand at any time that Mr. Compton objected to the repossession of the vessel? Any time that day, November 10th?

A: Mr. Compton at the boat objected to the repossession.

(RT 998):

Q: You understand that Mr. Compton was objecting to Mr. Nicoletti's repossession; isn't that correct?

A: Yes.

(RT 1005):

Q: Now, was there any -- did you have any doubt that Mr. Compton, either verbally or by his conduct, was objecting on November 10, 1977 to Mr. Nicoletti's repossession?

A: He was definitely objecting. There is no doubt about that.

IV. EVIDENCE DEMONSTRATING THAT THE PROCEDURE MANDATED BY THE SHIP MORTGAGE ACT WAS OBVIOUS IN 1977, AND THAT LT. BACA KNEW OF IT

Direct by Plaintiff's Counsel to Carlton Russell (RT 1362-64):

Q: You do recall -- can you tell us about that telephone call?

A: I got a call from Mr. Compton concerning the boat Magnifico II and the fact that people were trying -- I think it was the sheriff's department was down there to put somebody else in possession or take over his boat, and I responded to his inquiries and made certain inquiries of him.

Q: Can you tell us what he said to you and what you said to him, as best you can remember, please?

A: Well, it is as best I can remember, but the substance is clear to me in this sense. He was concerned about, "What should I do? These people are down here with a piece of paper." And I was concerned as a lawyer and I really didn't view it as an attorney/client relationship so much as a former client with a problem I am supposed to have some familiarity with, asking, you know, "What should I do?"

And I said, "Well, what is the piece of paper?" Because I wanted to know, it makes a big difference, and it turned out it was not a warrant for arrest of the vessel, which is the customary legal process issued out of federal court. And I think I really expected they had and then it turned out it wasn't the marshall, it was the sheriff, because I think a marshall as the United States Marshall who serves federal processes, and he finally explained to me or at least talked to me about it. It was a preferred ship mortgage and described a little bit about it.

I said, "Is that all?" And he said, "Well, yes." I said, "You mean there is no court process, there is no warrant of arrest, right of attachment," words to that effect. And he said, "What should I do?" And I said -- near as I can recall and certainly in this context, I said, "Well, I think I would get underway," meaning, you know, let's go to sea.

Q: Now, did Mr. Compton describe the paper as a preferred ship mortgage?

A: I don't specifically recall, but I was satisfied that it

certainly could have been, would have been consistent with my response.

Q: Did he describe to you the manner in which the preferred ship mortgage came into being?

A: Yes. He told -- I don't recall specifics, but it had to do with signatures either at gunpoint or some sort of lack of arms-length negotiation, because he must have told me it was a preferred ship mortgage or a document purporting to be that, because I said it doesn't matter to me whether it is duress or not, you know, it wouldn't make any difference in what my thought was.

Q: Why wouldn't it make any difference?

A: Well, from my background and experience, no one, that is, no lawyer advising a client seeking a remedy, assuming that the mortgagee is the person who wants to take the boat, wants that done other than by court process.

(RT 1367-70):

Q: Now, with respect to the rights, you talked about the fact that you get a complaint warrant of arrest and the marshal arrests the boat and takes it into custody.

A: Then there is a court hearing. I forgot to say you got to give the marshal these days $5,000 in advance or he won't move. Used to be $500.

* * *

Q: So, for example, in this case, it has been established that the document that you have before you was obtained by extortion. If there had been -- whether or not that was a validly executed document would have been -- could have been a subject of the hearing, the court hearing that you have just described?

A: Well, yes, matter of fact, and I should have mentioned this -- if there is anything wrong with the -- that is if the vessel owner thinks, "Hey, this is not a valid claim against my vessel and it is under arrest," he can go in for an immediate hearing before the judge to get the whole warrant of arrest vacated. There is a whole concept of law on unlawful arrest or it is not arrest in the sense that one person taking another in custody, but the court is open to determine whether or not that warrant of arrest should have been issued. There is a movement in effect to even require a judicial officer to look at it before it is issued, but that's not occurred yet.

(RT 1371-73):

Q: [D]id [Mr. Compton] give you any telephone numbers

A: He asked me, almost entreated me to call the sheriff's office, gave me a number and I did call the sheriff's office to kind of explain why they shouldn't be doing this, and if I didn't say it at least I thought -- I am not going to presume to tell the sheriff how to do his job, but I thought I might be able to at least find out what was going on because, frankly, I wanted also to make sure that we were only talking about a preferred ship mortgage document, that there wasn't some court process slipped in there that I was overlooking, because I would not want him to defy a court order.

* * *

Q: Did you speak with someone at that number?

A: Yes.

Q: Did that person indicate to you that they knew what you were talking about?

A: They were conversant with the facts.

* * *

A: I asked him what court process, if any, they were using. They said, "No, [the mortgagee's] got a document that says he has a right to take it over." And I told him I thought he ought to check with the Coast Guard, that that is not the purpose of the document he described.

Cross by Plaintiff's Counsel of Lt. Baca *(RT 1645-1646)*:

Q: You did speak with an attorney and he called you?

A: Yes.

* * *

Q: Did you ask him why he was calling you?

A: No. No, I didn't ask him why.

Q: Did he advise you that -- you heard Mr. Russell's testimony. Were you here when he testified?

A: Yes, I heard Mr. Russell's testimony.

* * *

THE COURT: Did you have the kind of conversation that Mr. Russell described having had with somebody at the Sheriff's Department while he was here testifying?

THE WITNESS: Yes. We discussed some points concerning maritime -- what you call maritime law.